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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS....*Petitioner*

v. No. 595

A. J. JOHNSON.....*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

GEORGE B. ROSE,
Counsel for Petitioner.

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REPLY BRIEF

We feel that we should call attention to a few errors and omissions in respondent's brief.

Counsel make no allusion to the numerous decisions of this Court, cited in our brief (page 18 et seq) holding that no injunction of a State Court can prevent a Federal Court from enforcing its judgment; and that it makes no difference whether the injunction decree was rendered before or after the decree of the Federal Court, nor whether the plaintiff in the Federal Court was a defendant in the injunction suit or not. We believe that this ground alone is entirely sufficient to warrant the issuance of a writ of certiorari; and apparently counsel are wholly unable to answer the argument advanced in our original brief.

Counsel make no reference to the fact that under the decision of the Supreme Court of Arkansas in the case of *Howard-Sevier Road Improvement District* v. *Hunt*, 177 Ark. 62-72 (see our brief page 25), the Commissioners were bound to plead any defense which could have been set up by the property owners; and that in pursuance to this decision the District pleaded in the Federal Court as *res judicata* both of the judgments rendered in the injunction suits brought by Johnson and by the Fishes against the Commissioners of the District, to restrain them from collecting anything more than the face of the assessments without interest (Tr. 38). The District Court filed no opinion; but it could not have rendered its decree without overruling this defense, and it is, therefore, conclusively shown that the plea of *res judicata* was denied.

Counsel do not controvert the self-evident propositions sustained by many authorities cited in our brief (p. 28) that the last decree in matters of *res judicata* is controlling, and that this decree of the Federal Court, affirmed by the Circuit Court of Appeals, is conclusive.

Counsel say on pages 3 and 7 of their brief that the only thing decided by the Circuit Court of Appeals in the case of *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 Fed. (2d) 783, was that the Court below properly instructed the Commissioners to bring suit to foreclose the lien of the delinquent taxes. If counsel had looked to the opinion they would have found that sections 1, 2, 3, 4, 6 and 7 all hold that the assessment of benefits bore interest at the rate of six per cent.

The Court also decided in its opinion that the Court below properly commanded the Commissioners of the District to act as its receivers in effect, as authorized by the decision in *Dickinson* v. *Minyea*, 191 Ark. 946.

It also decided that there was no error in the decree of the Court below.

Counsel say that the defense interposed by Johnson that he had paid the principal of his assessed benefits without interest was a special defense not concluded by the decree of the Federal Court. That decree (Tr., p. 20) found that the entire assessment of benefits bore interest at six per cent per annum, and it was affirmed by the Circuit Court of Appeals in every particular. It was decided by both these courts that the assessment on every parcel of ground in the District bore interest. It was not a special defense of Johnson's. He might have shown that he had paid the entire assessment of benefits with interest as adjudged by the Federal Court, and that plea would have been tenable, but he makes no such pretense. He only says that his assessment of $1600 was discharged by payment aggregating $1628 (Tr. 5), though interest at six per cent from 1913, (Appendix 13) or even from 1919, when the last statute was passed making benefits bear interest (Appendix 15), would have fully doubled the amount of the assessment.

Counsel say that the State Bank and Trust Company, for whose benefit the suits were brought, is not prejudiced by the injunction suits because abundant benefits remain to be collected. Their one witness (our brief page 30) says that the uncollected benefits amount only to $52,119.40, while the judgments, with interest, exceed $70,000.

Counsel ignore the fact that the Commissioners were acting as receivers in effect of the Federal Court in bringing the suit to foreclose the lien of the taxes, and treat it as if it were a mere suit brought by the Commissioners of their own volition, and responsible to no one for their action. When a suit is brought by a receiver, it is of course for the benefit of the parties entitled to his action, which, in this case, were the State Bank & Trust Company of Wellston and Mrs. Iddings. This suit for mandatory injunction was like a suit in mandamus, and in either case, the Bank and Mrs. Iddings were the relators.

Counsel say (page 8 of their brief) that the Federal Court only directed the Commissioners to bring suit. At the same time, it adjudicated that the Commissioners should act as its Receivers; it held that all the benefits bore interest at six per cent (Tr. 20); and its direction to them to bring suit necessarily meant that they should bring suit for the amount of the taxes adjudicated by the Federal Court, and until the indebtedness was fully paid or the assessments with six per cent interest thereon were exhausted.

Counsel cite the decision of this Court in the case of *Chicot County Drainage District* v. *Baxter, et al,* rendered on January 2, 1940, as showing that the decree in the injunction suits bound the holders of the certificates of indebtedness, including the Bank. In that case this Court laid down the rule, which it had laid down innumerable times before, that no judicial proceeding can bind a party unless he is notified and has an opportunity to defend. In that case the Court said:

> "The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceed-

ing and were parties and the evidence was to the same effect, showing compliance with the statute in that respect. As parties these bondholders had full opportunity to present any objections to the proceeding not only as to its regularity or the fairness of the proposed plan of readjustment or the propriety of the terms of the decree, but also to the validity of the statute under which the proceeding was brought and the plan put into effect."

Here, none of the holders of the certificates of indebtedness were parties to the suit and it is not shown that any of them had notice of the proceeding. Counsel say that it must be presumed that they knew all about it because their certificates were in default; but no holders thereof could anticipate such a proceeding on the part of the landowners. The certificates were negotiable, and they had bought them on the faith of statutes and decisions of the Arkansas Supreme Court upholding them, which made the benefits bear interest; and it would never have occurred to any of them that the property owners of the District would deny the force of those statutes and decisions, or that any Court would render such a decision.

Counsel say (their brief page 9) that they proved in their injunction suits that the tax sued for was not owing. They only proved that they had paid taxes amounting to the face of the benefits without interest. The Federal Court and the Circuit Court of Appeals had both decided that they bore interest at six per cent per annum, and those decisions bind all the property owners of the District.

Counsel say that this Court can afford no remedy because the Bank and Mrs. Iddings, holding the judgments in the Federal Court, are not parties to this proceeding. It

is sufficient to say that the suit is brought by the Commissioners who were required to act as receivers in the case in which the Bank was plaintiff and Mrs. Iddings was intervener. The suit was brought for their benefit, and the Commissioners as Receivers represented them.

Counsel say on page 11 of their brief that there is nothing in this record to show that the certificate holders were not advised of the injunction suits. Before a person can be held bound by a decree it must be shown that he was a party to the litigation or claims under a party thereto. Only parties and privies can be bound by a judgment.

Counsel say that (page 12 of their brief) there is nothing to show that the decree in the case brought by the two Fishes was collusive. Where a matter appears plainly on the face of the record, there is no necessity of oral evidence. The record here shows that the Commissioners who were defendants in the Fish injunction suit profited by the suit against them in a decree which relieved them of benefits aggregating $29,789.46; and that they took no appeal from the decision, though at that time there were numerous decisions of the Supreme Court of Arkansas holding that the statutes making benefits bear interest were valid.

The cases in which the Supreme Court of Arkansas had upheld the validity of statutes making assessments of benefits bear interest, decided prior to the decrees in the injunction suits of 1931 and 1932, and the year of the rendition of the decisions are as follows:

Olliver v. *Whittaker*. 122 Ark. 291, (1916); *Jones* v. *Fletcher*, 132 Ark. 328, (1918); *Skillern* v. *White River*

Levee District, 139 Ark. 4, (1919); *Phillips* v. *Tyronza Imp. Dist.*, 145 Ark. 487, (1920); *Pfeiffer* v. *Bertig*, 141 Ark. 531, (1920); *Summers* v. *Cole*, 144 Ark. 494, (1920); *Delinquent Lands* v. *Cache River Dr. Dist.*, 158 Ark. 581, (1923); and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 17, 172 Ark. 1059, (1927).

In the cases of *Skillern* v. *White River Levee District* and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 17, just cited, the statutes making the assessments of benefits bear interest were passed after the Districts had issued their bonds and done a part of their work.

Respectfully submitted,

GEORGE B. ROSE,

Counsel for Petitioner.